Recreational Use Of Montana's Waterways

A Report to the 49th Legislature
Joint Interim Subcommittee No. 2

December 1984

Montana Legislative Council

Published by
MONTANA LEGISLATIVE COUNCIL
Room 138
State Capitol
Helena, Montana 59620
(406) 444-3064

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SUMMARY OF RECOMMENDATIONS

Joint Interim Subcommittee No. 2, in its study of recreational use of state waters under HJR 36, recommends that the 1985 Montana Legislature:

1. Enact a bill to generally define laws governing recreational use of state waters, including:

(a) permitting recreational use of any surface waters, except waters while they are diverted;

(b) prohibiting, with certain exceptions, use of land beneath surface waters that do not satisfy the federal test of navigability for purposes of state ownership;

(c) confirming the right of the public to use the land between the ordinary high-water marks of surface waters that satisfy the federal test of navigability for purposes of state ownership;

(d) permitting the public to portage, above the high-water mark, around barriers in the least intrusive manner possible;

(e) restricting the liability of landowners when water is being used for recreation or land is being used as an incident to water recreation; and

(f) providing that a prescriptive easement cannot be acquired by recreational use of land or water.

2. Enact a bill to:

(a) eliminate the requirement that notice be posted or otherwise communicated for the commission of the offense of criminal trespass to land;

(b) impose absolute liability for certain criminal trespasses to land; and

(c) expand the authority of wardens to enforce the criminal mischief, criminal trespass, and litter laws on private lands being used for recreational purposes.

HOUSE JOINT RESOLUTION NO. 36

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY TO IDENTIFY AND PROVIDE FOR PRESERVATION OF THE RIGHTS OF LANDOWNERS ADJACENT TO PUBLIC LAND AND WATERWAYS AND TO IDENTIFY AND PROVIDE FOR RIGHTS OF THE PUBLIC TO ACCESS AND USE PUBLIC LAND AND WATERWAYS; REQUIRING A REPORT OF THE FINDINGS OF THE STUDY TO THE LEGISLATURE.

WHEREAS, the right of the public to use waterways for recreational and other purposes and the related issue of navigability are unsettled in law; and

WHEREAS, ownership rights in land underlying waterways and rights of adjacent landowners to place obstacles in waterways or to restrict use of streambanks are also unsettled; and

WHEREAS, the right of the public to use public land is being inhibited by restrictions of access across private adjoining land; and

WHEREAS, there is an increasing number of disputes between private landowners and public users concerning the use of public land and waterways; and

WHEREAS, both the adjacent private landowners and the public have substantial interests involved in the resolution of these conflicts.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That an appropriate interim committee be assigned to study ways to identify and preserve rights of landowners adjacent to public land and waterways and to identify and provide for rights of the public to access and use public land and waterways. The study committee shall cooperate with all interested persons to the fullest extent possible to:

(1) identify possible methods of acquiring and maintaining access across private land to public land and waterways;

(2) clarify the right of the public to use waterways, including:

(a) identification of waterways that may be used by the public;

(b) further legislative definition of navigability, if necessary;

(c) clarification of when a prescriptive use or easement may exist; and

(d) use of adjacent uplands in conjunction with the right to use the waterway;

(3) identify use rights and title interests of adjacent landowners in land under and adjacent to waterways, including:

(a) the right to place fences, bridges, flumes, or other obstacles in the waterway;

(b) consequent taxation liabilities; and

(c) mineral rights;

(4) establish the liabilities of landowners for impeding the right of the public to use public land or waterways and the liabilities of public users with respect to violations of rights of adjacent landowners; and

(5) determine appropriate methods of enforcement.

BE IT FURTHER RESOLVED, that the committee report its findings and recommendations to the 49th Legislature.

INTRODUCTION

Much of government revolves around deciding what is a public good and a private right and in finding ways to mitigate the inevitable conflicts that arise between them. Courts and legislatures play the lead role in deciding and mitigating these conflicts. Montana's waters are made available to the people of the state for their use. Our waterways provide water for us and our animals to drink and to water our crops; they also provide routes of navigation for trade, travel, and recreation. This study of the recreational use of Montana's waterways resulted from the tangible fears of the loss of ways of life and livelihood that arose among Montanans using waterways for recreation and those using them for agriculture and from demands made upon the courts and the Legislature to soothe those fears.

In December 1982, less than 1 month before the 48th Montana Legislature was to convene, the public's right to make recreational use of two Montana waterways -- the Dearborn and Beaverhead Rivers -- was affirmed by two Montana District Courts in separate cases.[1] The legal bases for the decisions were to some extent new to Montana and to the degree that the fears of some were relieved, the fears of others were further aroused.[2] Reaction to court action was reflected in petitions for legislative mitigation.

The 1983 Legislature considered seven bills related to the matter.[3] The bills failed due to a lack of consensus among those interested and uncertainty in the minds of the legislators as to the ramifications of the proposed pieces of legislation. Uncertainty was fueled

by the very fundamental nature of the controversy and the potential effect of any resolution of it on the way of life of so many people. Lack of consensus was promoted by the fact that hundreds of people and dozens of organizations presented different views on what should be done.

Complicating the ability of the Legislature to decide what to do (and complicating, during the interim, the committee's work) was the fact that in February and March 1983 in the midst of legislative deliberation, the Beaverhead and Dearborn River cases, respectively, were appealed to the Montana Supreme Court. Was it possible that the need for legislative action would be removed by the court?

Soon after it became evident that HB 888, the last remaining bill on the recreational use of waterways, was to die in committee, the Legislature passed HJR 36, a resolution calling for an interim committee to study the subject during the 1983-84 interim and make recommendations to the 1985 Legislature. When polled after the session, the legislators placed this study high on the priority list of interim studies to be conducted. In June 1983, the Legislative Council assigned Joint Interim Subcommittee No. 2 to study both the subject of water recreation under HJR 36 and fire suppression on state lands under HJR 40.

The resolution creating the interim study committee clearly asked that the interests and concerns of landowners and recreationists as related to recreational use of Montana waterways be addressed equally. Issues to be considered by the committee included: access to waterways; identifying waterways

subject to public use; understanding and defining, if necessary, the term "navigability"; clarifying when a prescriptive easement exists; clarifying the propriety of using adjacent uplands in conjunction with using a waterway; understanding title interests and consequent taxation liabilities; identifying the rights of landowners to place fences and other obstacles in waterways; identifying mineral rights of landowners; identifying landowners' and recreationists' liabilities; and studying appropriate methods of enforcing laws governing the resolution of these issues.

The subcommittee pursued its work diligently over the interim by delving into the legal intricacies of the dispute as well as by cooperating with and listening to the concerns of interested persons. The subcommittee pursued solutions that promised reconciliation of the concerns of interested parties within the constitutional framework available. But what seemed available changed considerably when on May 15 and June 21, 1984, the Montana Supreme Court handed down their decisions on the appeals of the cases[4/5] that had sparked the Legislature's involvement in the issue. Suddenly the options for Legislative redress were fewer. The subcommittee's task became one of understanding the nature of available options and framing a response within available limits. The recommendations reflected in this report represent the result of this work.

This report describes: (1) the facts, issues, and legal concepts concerning the subject of recreational use of state waters; (2) the public's sentiment on the subject, as gathered from public input at the

committee's meetings; and (3) the reasons for and meanings of the committee's legislative recommendations.

The committee wishes to thank Professor Al Stone for an informative presentation at the first meeting, which provided the committee with a good start in studying the complex legal issues before it. The committee also thanks John Thorson and Professor Margery Brown for their straightforward presentations on the public trust doctrine and their perseverance in presenting this judicial holding to a perhaps frustrated legislative audience. Finally, the committee gives special thanks to the many interested persons who spent long hours preparing for, patiently attending, and providing valuable commentary at the committee's meetings. This commentary and the public's attentiveness to the issues was invaluable to the committee's solid understanding of the subject matter and the range of views on it.

CHRONOLOGY OF COMMITTEE'S WORK

Much of this report summarizes the substantive findings of the committee, reviews details of public comment, and outlines the committee's recommendations. All of that was developed through a long and sometimes frustrating process. This chapter presents a brief outline of the committee's five meetings held between August 1983 and September 1984, to give the reader a feel for the context in which the balance of the report developed.

The Committee held its first meeting on August 30-31, 1983,[6] at which time it adopted a study plan to organize its work for the interim. The study plan directed the committee to answer four main and many subsidiary questions in order to study satisfactorily the issues raised in HJR 36 and to make recommendations to the next Legislature. The following are the main questions contained in the study plan:

> (1) What are the rights and responsibilities of the public related to recreational use of Montana waterways, including rights and responsibilities peripheral to the use of the waterways?
>
> (2) What are the rights (including title interests) and responsibilities of landowners of land under and adjacent to Montana waterways, related to recreational use of the waterways?
>
> (3) What is the nature of the conflict: who are the parties, what are the issues, and what is its extent?

(4) What can be done to resolve the conflict, and what is the best forum for resolution (i.e., judicial, legislative, executive, voluntary cooperation, education)?

At the first meeting, the committee plunged into the core of the complex legal issues before it by hearing a presentation by Al Stone, Professor of Law, University of Montana, of his paper entitled "Origins and Meanings of 'Navigable' and 'Navigability'."

Because of its difficulty, the legal notion of navigability was reviewed again for emphasis and expanded upon by committee staff, with presentations of their papers, "Understanding the Term 'Navigability'" and "Significant Cases on Navigability" at a meeting in January 1984.

At the same meeting, committee members listened to oral arguments presented to the Montana Supreme Court in the Dearborn River case. At the meeting, Gary Williams, a Missoula-based consultant and coauthor of the 1974 reports of the U.S. Army Corps of Engineers on the status of the navigability of Montana's eastern slope waterways, told the committee about the work done for the Corps on the question of stream navigability in the Missouri River basin.

A public hearing took up most of the committee's next meeting, held on March 31, 1984; the committee received testimony from interested persons for nearly 8 hours. After public testimony, the committee, with encouragement from the audience, recommended that interested groups and individuals organize on the local level to attempt to identify the floatable and nonfloatable

waterways in their areas. The conservation districts agreed to help organize and facilitate these meetings. The committee requested that the local meeting groups submit reports of their findings to the committee no later than June 30, 1984.

Staff developed a checklist of items to be considered at the local meetings, which were beginning to be organized in early May. However, before any of the meetings occurred, the Montana Supreme Court, on May 15, issued its decision in the Curran case, involving ownership and use of the Dearborn River and its bed. Soon thereafter, on June 21, the Court issued its decision in the Hildreth case, involving use of the Beaverhead River.

In these decisions, the Court affirmed broad recreational use rights of the public on Montana's waterways. Of special import to the committee was the Court's use of the Montana Constitution and the public trust doctrine as bases for its decisions. Since the Constitution and the public trust doctrine take precedence over statutory law, the decisions seemed to narrow significantly the policy choices available to the Legislature. The decisions burst the bubble of hope for cooperation and compromise that was carrying the local public meeting idea forward, and they were never held.

The committee held two meetings following the issuance of the decisions. At the first on July 30, John Thorson and Margery Brown presented papers on the public trust doctrine which had played a major role in the court's decisions and a major role in limiting legislative options. Also, staff reported on the

following: prescriptive easements; issues of landowner liability; terms and activities associated with recreational use of waterways, including access, trespass, litter, criminal mischief, and public nuisance laws; and the Department of Fish, Wildlife, and Parks' authority regarding recreational use of state waters.

The committee began formulating a legislative response by requesting bills that would include:

(1) a definition of "ordinary high-water mark";

(2) the elimination of recreational use of land as a basis for the acquisition of a prescriptive easement;

(3) a prohibition of public recreational use of waters while they are being diverted;

(4) the criminalization of any trespass action, whether or not prohibition of entrance to the land is expressly stated and whether or not the act is committed "knowingly";

(5) the elimination of a cause of action for civil trespass; and

(6) the prohibition of public use of the beds of waterways, except as unavoidably and incidentally necessary while using the waters (modeled after the Day v. Armstrong[7] decision of the Wyoming Supreme Court).

At the committee's fifth and final meeting on September 28, after receiving explanations of the bill drafts

from staff and comments from the public, the committee amended the bill drafts and recommended that they be introduced in the 49th Legislature. These amendments included:

(1) striking the material requested at the July 30 meeting which would have eliminated a cause of action for civil trespass;

(2) inserting a provision to restrict the liability of landowners when water or land is used pursuant to uses authorized under the bill; and

(3) inserting a provision to expand the circumstances under which wardens must enforce the criminal mischief, criminal trespass, and litter laws.

With that the committee's work was concluded and its recommendations entrusted to the wisdom of the 49th Legislature.

UNDERSTANDING THE TERM "NAVIGABILITY"[8]

Introduction

An ordinary person discussing with a lawyer the question of whether a particular body of water is navigable is in a position remarkably like that in which Alice found herself when attempting a friendly conversation with Humpty Dumpty as reported by Lewis Carroll in Through the Looking Glass:

> "When I use a word, it means just what I choose it to mean -- neither more nor less," said Humpty Dumpty.
>
> "The question is," said Alice, "whether you can make words mean so many different things."

"Navigability" has been labeled "chameleon in character"[9] as its meanings vary like the colors of the popular lizard depending on the surroundings in which it is found.

A policymaker concerned with recreational use of Montana's waterways must confront a baffling dialog surrounding this multifaceted word. It is applied by courts to justify conclusions that reach well beyond whether the body of water is wide or deep enough, or free enough from obstructions to be traveled on by a vessel of some sort. The basis of a right to run a barge business, a demand for a state share in oil royalties, the establishment of regulatory authority by the Army Corps of Engineers, or the opportunity for a carefree day floatin' down the river on a Sunday afternoon may all be tied to establishing a link between the word "navigable" and the water.

Most commonly, when a court describes a waterway as navigable, it does so to determine a basis to establish:

> (1) title to streambeds under the federal test;
>
> (2) federal constitutional authority under the Commerce Clause, federal court admiralty jurisdiction, and other federal authority; or
>
> (3) recreational and other public and private rights involving surface use of waters, use of the beds of waterways, and use of land adjacent to waterbodies under various state tests.

Clearly, a policymaker concerned with recreational use of waters is most concerned with what "navigability" may mean when applied to the third purpose above.[10] But applications are not always distinct and clear-cut. Confusion is more the rule than the exception. It will serve one well to try to understand the term in its several meanings and to understand how those meanings are rooted in our American history. Application of the term to recreational use may then be more clear and one may not feel compelled as Alice did to walk away frustrated and feeling conversation was impossible. Such is the goal of this chapter on understanding the term "navigability".

First Use: "Navigability" for Purposes of Title

Who owns the land under a creek, river, or lake? How does it relate to the term "navigability"? How did it come to be? The cultural roots to the answers to these questions twist their way into the deep soil of English common law. Here we can trace its path and show what

has grown from it but not follow every twist and turn. In England all title to lands traces back to the King. Lands were either granted by the King for private ownership or retained. It developed that lands under the sea up to high tide and other waters influenced by the tides were found to have been retained by the Crown. Incidentally those waters -- waters that ebbed and flowed with the tide -- were known in English law as "navigable" waters.

When English people colonized the eastern shore of America they carried with them their notions of English law. Among those notions was a presumption that the tidelands remained in the possession of the Crown rather than being passed to any private person.[11]

Well after the revolution and formation of the United States, when a dispute arose an American vine was grafted to the old English root. Our Supreme Court, asked to settle a dispute regarding the ownership of an oyster bed off the New Jersey shore, determined that the land, as tidal land, had been retained by the Crown. As a consequence of the revolution all such tidal lands, lands under "navigable waters", succeeded to the adjacent state as successor to the sovereignty formerly held by the Crown.[12] That was in 1842.

Three years later the court faced a dispute over the ownership of land under Mobile Bay in Alabama. Alabama was not one of the colonies, so Alabama did not succeed the King as sovereign and thus couldn't be found to own the land on the same basis as New Jersey or the other 12 original states. So a new doctrine, the "equal footing doctrine", was announced to allow Alabama to own the beds of its navigable waters the same as New Jersey did.[13]

The next major problem to be faced on the ownership question, to move us along in history, was faced in 1876: what about ownership of land under navigable inland waters? In a case involving the ownership of land under the Mississippi River at Keokuk, Iowa, the Supreme Court straightforwardly dismissed any lingering distinction history may have left between navigable and tidal waters. It used the rules adopted in the coastal cases governing ownership of the beds of navigable waters to determine that the state owned the bed of an inland navigable waterway. The reason of the rule applied equally in their view, namely: "that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for public advantage and convenience."[14]

While the question of how to determine ownership was growing in one direction, the question of how to determine navigability on a continental land mass using principles established in an island nation was growing toward it. As indicated above, the two grew together in Keokuk, but they developed separately.

As has been indicated, "navigability" in England was specifically related to tidal waters, and it was related to the floating of boats as might be expected. In general, "navigability" in England did not apply to inland waters. In early America, the English concept was adopted. There is a body of law known as "admiralty law", which is federal law, that governs relationships among navigators on navigable waters. Originally admiralty jurisdiction only covered tidal waters, for they were the only "navigable" waters in America, as in England. Extensive commercial navigation on inland waters in the United States,

however, gave rise to disputes analagous to those covered under admiralty law and caused the courts to be questioned as to whether many inland waters, such as the Great Lakes and their major tributaries, shouldn't be regarded as navigable in law as well as in fact. Two very important cases regarding what are legally navigable waters are our legacy from such disputes: The Genesee Chief and The Daniel Ball.[15]

It was The Genesee Chief that extended the concept of waters navigable in law to inland waters and The Daniel Ball that gave us the enduring federal test for identifying those waters.

So "navigability" was first extended to inland waters in 1851 for purposes of admiralty jurisdiction. The extension was adopted in the Keokuk case for property law purposes in 1876. That is how the old seacoast concepts from England became entwined as they grew inland in the United States. It is also interesting to note that through these cases, the federal courts have established rules to determine navigability for federal title purposes that establish state, not federal, ownership. Well, how do we do that?

It is important at this point to consider the legal test for navigability outlined in The Daniel Ball. This test, which has come to be known as "the federal title test", reads:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. (at 563)

The imprecision of this language (particularly with respect to the conduct of "trade and travel") is evident. Since The Daniel Ball ruling, the Court has provided more specificity to the definition of navigability as it is applied for title purposes. Yet the definitions that have evolved continue to lead to the conclusion that is implicit in The Daniel Ball quote that the ownership of the bed of a waterway is a question of fact particular to that waterway alone.

Despite this caution, some rules, with a fair degree of certainty, can be said to apply to the federal title test. These rules help answer when and how state ownership of streambeds is settled.

First, it is firmly established that title determinations are made by consideration of the waterway's characteristics at the time of statehood, since this is the time that title would have passed to the state.[16] Confusion may arise because courts determine questions of title at times much later than statehood. However, what must be remembered is that the court determination is of a condition which existed at statehood. Thus, a determination of state ownership of the bed of a waterway settles a preestablished fact and does not constitute an unconstitutional "taking". It is noted that the difficulties in obtaining accurate historical data regarding a waterway's characteristics will only increase with the passage of time.

Second, active use at the time of statehood need not be proved; rather, susceptibility of use is the standard.[17]

Third, intrastate (as opposed to interstate or foreign) commerce is sufficient for a finding of navigability.[18]

Fourth, impediments to navigation do not preclude a finding of navigability.[19]

Fifth, the U.S. Supreme Court has firmly stated that meandering done by federal surveyors does not "settle questions of navigability."[20]

Sixth, use of the federal test to determine title is mandatory. State courts have jurisdiction to decide title questions, but they must use the federal test as enunciated by the federal courts (The Daniel Ball test). Neither the state nor the state courts may establish a standard for title determination that differs from the federal standard.[21]

There is one important aspect of settling a title question that the federal test does not clearly address: the location of the boundary delineating public ownership. Courts have generally used the high-water mark as the boundary,[22] but no rule requiring that standard of states has been enunciated. In Montana, the low-water mark has been adopted by statute (§70-16-201, MCA) to delimit the boundary of state ownership.

This section has described the meaning and application of the term "navigability" in relation to its use in settling title questions. There are some consequences significant to the floating of boats and related activities when a title question is settled based on navigability. The public may use navigable waters and their beds to the ordinary high-water mark for certain purposes including recreation.[23] Additionally, in Montana, a statutory easement for fishing exists on the strip of land between the low- and high-water mark on a navigable stream.[24]

Second use: "Navigability" for Purposes of Federal Jurisdiction under the Commerce Clause and Other Federal Jurisdiction

Article I, Section 8, of the U.S. Constitution contains the Commerce Clause:

> "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes, . . ."

It is in furthering the implementation of this constitutional provision that federal concepts of navigability have been most fully developed. A finding of navigability for Commerce Clause purposes or for other federal jurisdiction may bring federal agency activity onto a stream, but it has no direct effect on the ownership of the bed and banks.

Gibbons v. Ogden,[25] decided in 1824, was the first case to establish congressional authority over navigation affecting interstate commerce. Not until the 1870 decision in The Daniel Ball did a widely used specific definition of navigability for federal purposes first appear. The test developed in this case -- that of "trade and travel" -- not only relates to the authority of Congress under the Commerce Clause but also reflects the historical uses of waterways.

A U.S. Supreme Court case often recognized as having delineated different tests for determining navigability under the Commerce Clause as opposed to navigability for purposes of title is United States v. Appalachian Electric Power Co.,[26] decided in 1940. The distinctions made by the Court are twofold. (1) Under the

Commerce Clause, navigability of a waterway "may later arise."(at 408) (It need not be determined as of the time of statehood, as required under title navigability.) (2) "Artificial aids" and "reasonable improvements" made on a waterway do not preclude a finding of navigability.(at 407, 409) (Title navigability, however, is probably based on the consideration of a waterway in its natural condition.)[27]

Another distinction between navigability for title and navigability for purposes of federal authority under the Commerce Clause is the requirement, under the latter purpose, that the waterway serve as a link in interstate or foreign (as opposed to intrastate) commerce.[28]

The navigability of waterways for Commerce Clause purposes is indelible: "When once found to be navigable, a waterway remains so."[29]

Other aspects of waterways navigable for title are similar to aspects of waterways navigable for purposes of federal authority under the Commerce Clause. This is especially true because the courts, with regularity, have decided both title and Commerce Clause cases by intertwining theories from each, as was described in relation to the important Keokuk case.

Finally, it should be noted that federal powers over waterways under the Commerce Clause can extend beyond navigable waterways. For example, the nonnavigable tributaries of waters involving interstate commerce may fall under federal control.[30]

In sum, the test of navigability for purposes of federal authority under the Commerce Clause only subtly

differs from the test for determining navigability for federal title purposes. Under each, it is the "trade and travel" standard that is the basis from which the tests develop.

Federal authority over navigable waters is most frequently exercised under the Commerce Clause. However, this authority is also based in other constitutional provisions, such as admiralty jurisdiction, treaty and war powers, the General Welfare Clause, and the Property Clause. Since these bases for authority so infrequently arise, they are mentioned here but not discussed.[31]

Once again, as with waters navigable for title, when a navigability standard is used to determine federal authority for various purposes, a corollary outcome is sufferance of public surface use of waters that are "public highways."[32]

Third Use: "Navigability" for Recreational and Other Public Uses

"Navigability" has been used in some states to establish public use rights including recreational use rights.[33] Control over the meaning and application of the term in these additional cases is a matter for the states to determine. (More will be said about this later.) State courts and state legislatures have developed a variety of definitions, tests, and meanings for the term. It is thus not surprising that there are conflicts among meanings and applications between states and between the state and various federal meanings. A stream that is "nonnavigable" for federal title purpose may be "navigable" for certain public use

purposes under a state test. "Navigability" in this third context is thus virtually synonymous with "usable by the public." Recreational use is the most common use by the public affirmed when a state standard of navigability is involved.

These state-based applications of "navigability" to settle questions of the right to use waters do not have anything to do with conferring title to the bed or banks of the waterway. Traditional property law tells us that whoever owns the land owns all above it.[34] Yet we are familiar with exceptions to that rule. City streets and county roads commonly pass through private property by easement. Mineral rights are often severed from the surface ownership. State findings that a waterway is usable by the public establish a kind of easement across private property with no transfer of title.

Extensive recreational use of waterways, other than for purposes of fishing, is a recent historical occurrence. Therefore, state statutory and case law regarding recreational use of waterways is not yet fully developed. One matter that is firmly settled, however, is that, apart from federal limitations already discussed, public use rights are a matter of state law and may be defined in ways not dependent on the federal tests. As stated by one author:

> . . . the federal test for land-title and federal jurisdiction does not have to be the test for state determinations of the waters that are public for various state purposes.
>
> The public opportunity and demand for water use is no longer so limited as it was during the period of development of the test for public waters for federal purposes . . . .[35]

However, before the U.S. Supreme Court held that the question of navigability for title was an exclusively federal question in 1926, the courts did not always distinguish between title navigability and navigability for public recreational purposes. Instead, courts simply concluded that if a water body was navigable for title, it was open to public use; conversely, if the water body was not navigable under the title test, public use was not allowed.[36]

Further confusing the issue was the fact that state courts were inventing their own tests for navigability for title as well as for other purposes. Courts on occasion defined state ownership of the beds of waters by using a test less restrictive than The Daniel Ball test. For example, in the Minnesota case of Lamprey v. Metcalf,[37] decided in 1893, the Minnesota Supreme Court adopted what has been referred to as the "pleasure boat" test, in a case brought to determine title. In 1926 it was clarified that this is an improper test to determine title, but the case is often cited as an authority on questions of public recreational use rights.

> Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit . . . . To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. (at 1143)

Although the courts, subsequent to 1926, have not always adhered to correct distinctions between title and recreational use tests, such distinctions have become increasingly recognized and more firmly founded.

There is a clear trend in the states today to affirm public use rights on waterways other than those navigable under the federal title test. Colorado is a rare exception to this trend.[38] Although the general results of court decisions may be the same, these courts use many diverse bases in reaching their results. As one author writes:

> There are probably few areas of law in which similar problems have arisen in the several states where the courts have split so widely, or based their decisions on such diverse theories.[39]

Three primary bases are used by courts in upholding public use rights. They include: (1) interpretation of constitutional language that waters of the state belong to the public; (2) defining riparian rights so as to allow for public use of the waters; and (3) the public trust doctrine. The courts often intertwine all three. And the term "navigable" may or may not be associated with the result.

In Montana, the Supreme Court based its decisions recognizing public use rights on language in the state constitution and on the public trust doctrine. (The Montana decisions will be discussed in detail later in this report.)

The first basis, the state constitution, was relied upon by the state Supreme Courts in New Mexico,[40] Wyoming,[41] and others[42] in deciding for public use of waters. The New Mexico Constitution states: "The unappropriated water of every natural stream . . . is hereby declared to belong to the public and to be subject to appropriation for beneficial use . . . ."[43] The Wyoming Constitution reads: "The water of all

natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state."[44]

In a Wyoming case, Day v. Armstrong, the state Supreme Court reasoned:

> The title to waters within this state being in the state, in concomitance, it follows that there must be an easement in behalf of the state for a right of way through their natural channels . . . . (at 145)

In contrast to the above decision, the Colorado Supreme Court expressly rejected the argument that the state's constitutional language declaring waters "to be the property of the public"[45] applied to recreational use rights. Instead, the Court held in People v. Emmert[46] that this constitutional provision applies to water appropriations (about which the constitutional language does speak). The Court stated:

> Constitutional provisions historically concerned with appropriation, therefore, should not be applied to subvert a riparian bed owner's common law right to the exclusive surface use of waters bounded by his lands. (at 1029)

This ruling, while illustrative of the breadth of variance found in applying state tests, is recognized as being the exception to the general rule allowing public use of waters over privately owned beds.[47]

The second basis for court findings of public recreational use rights -- that of defining and thereby limiting riparian rights so as to allow for public use -- has been used in Minnesota and Washington. Its use may take on different forms. For example, some courts speak of a "public easement" to use the waters flowing

over privately owned lands. Another situation is one in which courts have concluded that, practically speaking, exclusive private use rights of the waters over a pie-shaped portion of a lake's bottom have little meaning. In these cases, the riparian owners on the lakes in question were held to have mutual easements to use the entire surface of the lakes.[48] In one case the public benefited in the easement, as the state was a riparian owner with a park on the lake.

The limited nature of riparian rights is stated by one author:[49]

> It is to repeat the obvious to state that riparian rights vary from time to time and from place to place, depending on social, economic, and political needs of society as viewed by its judiciary. The courts in this . . . group of states believe that society's needs require the recognition of a public right of use . . . even where the beds of the waters were privately owned. These courts define riparian rights so as to deny riparians the right to exclude others from the use of the water.

For example, the court in Day v. Armstrong reasoned:

> The waters not being in trespass upon or over the lands where they naturally appear, they are available for such uses by the public of which they are capable. (at 145)

In J.J.N.P. Company v. State of Utah,[50] the state Supreme Court ruled on the limited nature of riparian rights:

> Private ownership of the land underlying natural lakes and streams does not . . . defeat whatever right the public has to be on the water. (at 1137)

The third basis used by courts in affirming public use rights of waters is the public trust doctrine. It was used explicitly in Montana in the Curran and Hildreth decisions, and Professor Stone has argued that all the other court cases are really "inarticulated public trust cases". He points out that "[t]he interesting aspect of [them] is that only a slight difference exists in the result of any of them, although they employ diverse theories as the mechanism for reaching the result."[51]

Because of its breadth and power, the public trust doctrine has earned its own chapter in this report and so will not be discussed further here.

In conclusion, we see that "navigability" is indeed "chameleon in character" with meanings changing in every different situation. We must thus be ever careful to note precisely what is meant to be shown or accomplished by the use of the term.

> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master -- that's all."

THE PUBLIC TRUST DOCTRINE[52]

The public trust is a longstanding doctrine having its roots in both civil and common law. According to the doctrine, as an inherent aspect of sovereignty, government must preserve and protect particular resources within its jurisdiction for the public good and the good of the resource. Historically, in America, the doctrine has been applied to protect the public uses of commerce, navigation, and fishing upon navigable waters and their beds. (Thus, there is seen a relationship between the traditional applications of the public trust doctrine and the public purposes behind the trade and travel test of the The Daniel Ball.) In recent times, application of the doctrine has expanded both beyond federally navigable waters and to include the protection of uses other than commerce, navigation, and fishing. Its evocation by the Montana Supreme Court in the finding of a public right to the recreational use of Montana's waterways makes an understanding of the doctrine vital to understanding the subject of this report.

The Institutes of Justinian, in restating Roman law, provide the civil law origins of the public trust doctrine: "By the law of nature these things are common to man -- the air, running water, the sea and consequently the shores of the sea."[53] The same trust principles were recognized under and adapted to English common law, where ownership of public trust resources was in the King. Thus, "all things which relate peculiarly to the public good cannot be given over or transferred . . . to another person, or separated from the Crown."[54]

In this country, public trust principles are found in Massachusetts' "great pond" ordinance of 1641,[55] which guaranteed the right to fish and fowl in ponds of 10 acres or more, and in the Northwest Ordinance of 1787, in which Congress guaranteed that the "navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free . . . ."[56] In 1821, the New Jersey Supreme Court recognized the public importance of certain waters and said:

> [T]he sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common rights.[57]

The leading public trust case in this country is Illinois Central Railroad Co. v. Illinois,[58] decided in 1892. In 1869, the Illinois Legislature granted to the Illinois Central Railroad virtually the entire waterfront of Chicago: 1,000 acres of tide and submerged land. The Legislature later rescinded the grant, extending nothing more than incidental compensation to the railroad. The U.S. Supreme Court upheld the legality of the recision and stated:

> The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. (at 453)

The Illinois Railroad case provides the essence of the theories that are applied by courts to determine whether a particular state action is in compliance with the public trust doctrine. The general rule is that state action cannot absolutely convey or adversely affect public trust property, except in limited instances.

In determining whether a state action is in compliance with the public trust doctrine, the courts generally consider: (1) whether the property in question is within the public trust; (2) whether a state action has alienated or somehow adversely affected property held within the public trust; and (3) whether, if there has been an alienation or limitation of public trust property, it is permissible because it was done for a public trust purpose (or whether, if not done for a public trust purpose, the resource conveyed is of little value and the conveyance can be made without impairing the public interest in the property that will remain in the public trust).

Courts have invoked the public trust doctrine with increasing frequency. Two significant developments recently have occurred. First, the doctrine has been held to apply to waterways not navigable under the federal title test.[59] Second, public purposes protected by the public trust doctrine have expanded beyond commerce, navigation, and fishing to include not only recreational use of waters but also the broader modern day concerns of environmental nondegradation.[60]

Another application of the public trust doctrine that has received recent attention is its interrelationship with the prior appropriative system of water rights, as

discussed by the California Supreme Court in the case of National Audubon Society v. Department of Water and Power of the City of Los Angeles, otherwise known as the Mono Lake case.[61]

The California Supreme Court has described the public uses subsumed by the public trust doctrine as "sufficiently flexible to encompass changing public needs."[62] Broadly speaking, however, the rationale behind the doctrine is the same now as it was under Roman and English common law: to provide protection of publicly important resources for public purposes.

In short, the public trust doctrine provides basic prohibitions upon the state (or legislature) of unrestrained alienation of public trust property or disregard of public trust principles. Yet beyond establishing a framework for protection of the public interest, there exists within the public trust doctrine broad legislative prerogative to manage the public trust resource.

How the doctrine was applied in recent Montana cases is the subject of the next chapter.

THE CURRAN AND HILDRETH DECISIONS[63]

In cases decided May 15 and June 21, 1984, the Montana Supreme Court relied on the public trust doctrine and the 1972 Montana Constitution to hold that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." The Supreme Court also ruled that the public has the right to use the bed and banks of public waters to the ordinary high-water mark and is allowed to portage above the high-water mark around barriers in waterbodies in the least intrusive manner possible. In each case, the Supreme Court affirmed the results of District Court decisions while using different means from those used by the lower courts to reach these results.

Montana Coalition for Stream Access v. Curran

The Montana Supreme Court, on appeal, affirmed the District Court's application of the federal title test for navigability, ruling that the state of Montana had owned the bed of the Dearborn River since 1889, the time of statehood. Consistent with the District Court, the Supreme Court drew a sharp line between the federal test for navigability and the state's test for determining public recreational use rights.

Unlike the District Court, the Supreme Court used the public trust doctrine and the 1972 Montana Constitution as the bases for its decision. (The District Court had used statutory interpretation and a "recreation craft" test, i.e., if the waterway can be floated by a craft, it can be used for aquatic recreation, to determine public recreational use rights of waters.)

Central to the discussion of the public trust doctrine in the Supreme Court's decision is the proposition that when, at the time of statehood, the states acquired title to the beds of navigable waters, such title was held "in trust for the public benefit." However, the Court did not confine its application of the public trust doctrine to waters found navigable under the federal title test. The Court interwove the public trust doctrine with the language of Article IX, Section 3(3), of the Montana Constitution, which states:

> . . .
> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

From this, the Court reasoned:

> If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.
>
> If the waters are susceptible to public recreational use, they may be so used by the public.

Drawing on both statutory and case law, the Supreme Court further held that the public has a right to use state-owned waters to the point of the high-water mark. (Although the Court did not specifically articulate a public right to use the beds of the waters, such right is implied in this case and is clearly enunciated in the Hildreth decision.) In case of barriers in the water, the Court ruled that the public is allowed to portage around them "in the least intrusive way

possible." The Court stated unequivocally that the public does not have the right to enter private property in order to enjoy the recreational use of state-owned waters.

The Supreme Court dismissed Curran's contention that property was being taken without compensation because the Court found that Curran had no claims to the waters of the Dearborn, and hence there could be no taking.

Montana Coalition for Stream Access v. Hildreth

As in the Curran case, the Montana Supreme Court in the Hildreth case affirmed the result of the District Court's decision while significantly modifying that Court's conclusions of law. Unlike the District Court, the Supreme Court expressly declined to adopt a specific test for the meaning of "recreational use," saying that to do so would be "unnecessary and improper." (The District Court had adopted a "pleasure-boat test of navigability" to determine public recreational use rights.)

The Supreme Court explained that it would not devise a test for determining the meaning of recreational use since "the capability of use of the waters for recreational purposes determines whether the waters can be so used." Because the Constitution does not limit the waters' use, the Supreme Court ruled that it cannot "limit their use by inventing some restrictive test."

Finally, the Court stated:

> Under the 1972 Constitution, the only possible limitation of use can be the

> characteristics of the waters themselves. Therefore, no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property.

The Supreme Court also cited Curran and mentioned the public trust doctrine as a factor in its determination affirming public recreational use rights.

The Supreme Court in Hildreth clearly enunciated the public's right to use the bed and banks of state waterways to the ordinary high-water mark. Again, the Court affirmed the right to portage around barriers in a manner that avoids damage to the adjacent landowner's property. Again, too, the Supreme Court declared that the public has no right "to enter upon or cross over private property to reach the State-owned waters held available for recreational purposes."

Unlike the decision on the Dearborn River, the Beaverhead decision did not include a determination as to the ownership of the river's bed. Thus, the Supreme Court decision in Hildreth established public recreational use rights on a stream which has not been adjudicated for title purposes. In both cases, the Court emphasized that the question of title to the underlying bed is "immaterial" to the question of the public's rights of recreational use of the waters.

In reaching the two decisions, the Montana Supreme Court tied the public trust doctrine to the provision in the state's fundamental law, the 1972 Constitution, declaring that all waters within the boundaries of the state are the property of the state for the use of its people. A doctrine, which traditionally has been linked to waters (and the beds of waters) declared to

be navigable under the federal test for title determination, was here held applicable to all surface waters in the state. The decisions affirm the public's right to make recreational use of waters in Montana capable of such use.

PUBLIC COMMENTARY

Much of the committee's activities centered on eliciting public opinion with regard to both the general issues of public recreational use of waters and their underlying beds and the peripheral issues of litter, trespass, liabilities, and others. Public testimony was largely divided into that presented by recreationists and that offered by landowners. Each group expressed fears that rights they traditionally had assumed to have held were being threatened by the will of the opposing group. All recognized that public recreational use of waterways is an activity that has burgeoned in a relatively short amount of time.[64]

Recreationists pointed to the economic benefits to the state of this expanding industry.[65] They spoke convincingly of the need of the public to be able to enjoy and make use of Montana's public trust resource.

Landowners, on the other hand, told the committee that their management practices were being adversely affected by the influx of water recreationists. Litter problems are increasing. Weeds are rapidly spreading as a result of increased stream use, erosion of land will occur, and calving and other livestock operations will be disrupted. One landowner asserted that what used to be an asset, owning land under and adjacent to waterways, is now a landowner liability.[66]

Despite the polarization between landowners and recreationists, at one point in the interim (at the March 1984 public hearing) the groups seemed to agree that "90%" of both the landowners and recreationists cooperate, create no problems for the other, and have

mutual respect for the other's rights, as well as the resource. It was the "10%" who cause problems that provided the reason for the committee's existence and who have created hardships and hostilities amongst all.

The Curran and Hildreth decisions distinctly altered public testimony to the committee. Specifically, discussion of the general issue of use of waterways and their underlying beds changed from public discussion in search of establishing policy in this area to public discussion as a reaction to the Supreme Court's decisions. Another difference in public input pre- and post-Curran and Hildreth was in the notable absence, with only a few exceptions, of participation by recreationists following the decisions. Discussion of the secondary issues (e.g., litter, trespass, etc.) took place throughout the interim.

This chapter attempts to summarize the public's comments to the committee. It is divided into public opinion with regard to recreational water use rights, generally, and with regard to the issues that are incidental to water use. The chapter concentrates on the issues incidental to water use, as those were the ones about which the committee ultimately could set policy. The summary of the public's sentiment with regard to public recreational use of waters is provided primarily for historical purposes.

Use of the Waters and their Underlying Beds

The committee received an exhaustive array of proposals for establishing policy on which waters and to what extent the beds of waters over privately owned land should be open to public use.

At one end of the spectrum was a proposal to allow public use of only those waters and beds of waters that satisfied the federal title test of navigability. Under this proposal, waterways and their beds which did not satisfy the federal title test could be used on a permission-only basis. This would be similar to the rule established in the Colorado case of People v. Emmert. The argument in support of this policy is similar to the one used by the Colorado court: whoever owns the land, owns all above it and all below it. The landowner pays taxes on the land; therefore the landowner should have complete control of the activities over his land. There is no recognition of an easement on the waters.

At the other end of the spectrum was the rule established by the Montana Supreme Court. Any surface waterways and their beds to the ordinary high-water mark that are capable of recreational use may be so used by the public.

Across the spectrum were a variety of options. However, one of the greatest problems faced by the committee (prior to the Supreme Court decisions) was that of defining a rule for recreational use of waters that would be suitable in all its applications. As stated by one person, "One river is 100 rivers."[67] Not only was it difficult to establish a test to determine floatability, the committee also faced the task of establishing the rule to be used with regard to use of the beds. Should the boundary of use rights be the low-water mark or the high-water mark? Should the floater be allowed to wade? Push off from shore? Picnic? Camp? Make repairs? Eliminate human waste? Anchor the craft? Portage?

The committee's last action before the Montana Supreme Court decided the Curran and Hildreth cases was to recommend that local meetings be organized whose goal would be to bring together recreationists and landowners, county by county, to determine which waterways were floatable, which were not floatable, and which were the "gray" waterways on which a consensus as to their floatability did not exist. This approach of the committee evolved at the March 31, 1984, hearing, at which it appeared that general agreement among those participating was emerging and perhaps could be solidified in specific terms, if the participants were given more time and the opportunity to continue dialogue.

However, before the local meetings were held, the Supreme Court issued its decisions, placing significant restraints on the Legislature. The committee therefore cancelled the local meetings and pursued the study of those issues peripheral to the use of waters and their beds.

During the course of the study, the public made the following suggestions with regard to setting the general policy on recreational use of surface waters and their beds:

-- Establish a "craft" test, similar to the one in HB 888 (from the 1983 Legislature), and authorize use of waters and their beds to the ordinary high-water mark if they can be floated by a craft.

-- Allow public recreational floating on waterways that have an established history of such floating.

-- Allow use of waters, but prohibit use of beds that are privately owned unless permission is granted by the landowner. (This proposal is similar, though not identical, to the committee's LC 69.)

-- Develop conservation easements and recreational corridors, as has been done on the Blackfoot River.

-- Place the responsibility for deciding which waterways are floatable on the navigator and minimize the state's involvement.

-- Establish a water recreation test based on the volume of water in or the width of the waterway. (An obvious drawback to this approach is that a watercourse beginning as a narrow trickle may be a federally navigable waterway at its mouth.)

-- Determine where on the course of a floatable waterway the capacity to float begins.

-- Establish a permit system. The heavy recreational use of Montana's waterways seems to demand this be done. (The Department of Fish, Wildlife, and Parks states that it does not have statutory authority at present to establish a permit system. Also, the Department believes that the present situation does not "warrant this type of dramatic approach, although it may be needed at a later time."[68])

-- Do not establish a permit system because this would create as many problems as it solves.

-- Establish regional floating seasons, recognizing the seasonal fluctuations of the waterways and the needs of recreationists and landowners (e.g., calving seasons, hunting seasons.)

-- Place responsibility for management of the public trust resource on those who are closest to the resource: the landowners, the traditional stewards of the land. Such management would aid in protecting soil erosion and in the control of weeds, for example. (This alternative was mentioned by a committee member, not a member of the public.)

-- Protect the resource by prohibiting recreation that creates environmental damage, such as deterioration of the water quality.

-- Consider the presence of obstacles in the waterway when establishing floatability.

-- Prohibit public use of waters while they are being diverted away from a natural water body. (The committee has recommended this proposal in LC 69.)

-- Quiet title to all the state's waterways within a given time, for example, by the end of the century.

-- Establish recreational use rights by distinguishing between creeks and streams, and allowing public use of streams but not creeks.

Peripheral Issues

Members of the public raised the following peripheral issues during the course of the interim as problems, either existing or anticipated, and solutions to those problems created by public recreational use of waters. It was the responsibility of the committee -- and now is the responsibility of the Legislature and those setting policy -- to determine which of these stated problems need to or can be addressed through legislative or administrative solutions and to choose the best means for addressing them. The outline of the issues below does not attempt to weigh their relative importance, assess the merit of the recommended solutions, or measure the validity of the claims made.

-- Access. The state should sell the public access sites, and give the landowners the right of first refusal. It was argued that if all land adjacent to streams were privately owned, the recreationist would not have difficulty knowing if he were trespassing. Also, elimination of public common areas would help reduce the problem of litter. (Arguments were made against this recommendation and as testimony to the success of access sites, particularly in reducing the responsibilities of landowners already burdened by the right of the public to make recreational use of water.)

-- Compensation. The Legislature should establish a property damage reimbursement program, funded by a recreationists' user fee, aimed particularly at reimbursing landowners for damages resulting from water recreation activities. (There was much testimony during the interim that landowners'

property was in danger of being damaged, as a result of the increase in public water recreation. Fires and broken fences are examples of such damage mentioned.) A similar proposal was recommended by the landowner-sportsman advisory council, appointed in 1977, and introduced as HB 575 in the 1979 Legislature, which applied to any damage caused by hunters, fishermen, or trappers.

-- Criminal Mischief. Section 45-6-101, MCA, sets forth Montana's law on criminal mischief. The offense of criminal mischief is committed if a person "knowingly or purposely":

> (1) injures, damages, or destroys any property of another or public property without consent;
>
> (2) without consent tampers with property of another or public property so as to endanger or interfere with persons or property or its use; or
>
> (3) fails to close a gate (not located in a city or town) previously unopened which he or she opened and which leads in or out of any enclosed premises.

The difficulty of proving the "knowingly or purposely" mental state was expressed by and to the committee.

-- Department of Fish, Wildlife, and Parks. Some argued to the committee that the Department's authority, particularly in the area of enforcing trespass laws, should be expanded. One person argued in favor of reducing the state's

interference with matters that are best handled by the landowners and recreationists involved. Committee members raised questions as to what, if any, increase in appropriations will be required by the Department as a result of its increased responsibilities pursuant to the Supreme Court decisions and the committee's trespass bill, LC 87.

-- Education. Education regarding public recreational use of Montana's resources is provided by the Department of Fish, Wildlife, and Parks for those activities licensed, such as hunting and fishing, and by outfitters. Dissemination of information with respect to other forms of recreation is lacking. Improved education as to the rights and responsibilities of landowners and recreationists could reduce the conflicts between these groups.

-- Fences. The committee was informed that the Supreme Court decisions, allowing the public the right to portage around barriers, implied that the landowner may place a fence on a stream whose bed is privately owned. Landowners claimed that their fences have been and will continue to be cut. Recreationists feared that landowners would place fences in waterways for purposes of harassment. Will landowners be required to place warning signs on a waterway when there is a fence? Should the Legislature require that obstructions conform to certain specifications (e.g., fence style, bridge height)? A river ranger of the Department of Fish, Wildlife, and Parks described a float gate that has been tested, and a landowner told the

committee that he was reimbursed by the Department for some materials he used in building a float gate. (See also Public Nuisance and Liabilities.)

-- High-Water Mark. There must be certainty that the Supreme Court's use of the term refers to the "ordinary" not the "flood" high-water mark.

-- Legislating by the Court. There was a feeling among some members of both the public and the committee that the Supreme Court had gone beyond its role of interpreting the law and had improperly legislated on the subject of public recreational use of waters. There was much frustration that neither the Legislature nor the public had any recourse to change the Court's decisions. Some recommended that the committee draft "a resolution to urge the Supreme Court to return to its duty of interpreting the laws."[69]

-- Liabilities. Historically, liability law is not codified because it is difficult to anticipate every situation that can arise.

A landowner cited the following as an example of a possible liability case. A landowner may have a fence that is above the water during the normal season; during times of high water, the fence may disappear below the water and injure a floater who does not see it. Is the landowner liable for the injury?

There was sentiment that landowners should not be liable to persons using waters or land incidental to water use. "Willful or wanton misconduct" on the part of the landowner was suggested as an

exception to a limitation on landowner liability; such an exception would act as a disincentive for landowner harassment of recreationists.

-- Management. Improved resource management could help preserve the water resource and reduce the conflicts between landowners and recreationists. HB 877, from the 1983 Legislature, addressed issues of water recreation management, including providing adequate access sites, assisting landowners in constructing and maintaining fences, posting signs, publishing maps, and assisting in the cleanup of litter on waterways.

-- Portaging. Recreationists wanted a guarantee of their right to portage. Landowners wanted assurance that the Supreme Court decisions did not require them to provide portage routes. Questions unanswered in the Supreme Court's decisions include whether the right to portage applies to non-floaters as well as to floaters and their boats, what a reasonable portage distance is, and whether portaging is allowed around natural and/or artificial barriers. (LC 69 answers this last question in its definition of "barriers.")

-- Public Nuisance. Section 45-8-111, MCA, defines a public nuisance under criminal law as including "a condition which renders dangerous for passage . . . waters used by the public." The committee was informed that "It is possible that a barbed wire fence across 'waters used by the public' that is difficult to see from the waters and which renders those waters 'dangerous for passage' would be considered a public nuisance

under this law. This, of course, would be a question of fact."[70] In the civil area, §27-30-101, MCA, declares that a nuisance includes anything "which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin."

-- Recreational Use. "Recreation," with respect to the public's right to use the state's waters, must be related to the water resource and must not harm the resource. Can it be defined more specifically? Does "recreational use," as used by the Supreme Court, include such things as duck hunting, other forms of hunting, ice skating, the use of three-wheelers or motorcycles, snowmobiling, or the floating of toy boats?

-- Review Board. The Legislature should establish a review board, composed of landowners, recreationists, and other interested parties, to which problems could be taken and resolutions determined.

-- Taxes. It was suggested that landowners be granted a tax credit for that portion of their land subject to an easement for water recreation. Opposition to this suggestion was based on some landowners' opinions that such a tax credit would, at least implicitly, qualify their ownership of their land.

-- Trespass. Problems related to the present trespass laws are threefold:

(1) because of the posting requirement, the burden of preventing trespass is now on the landowner rather than on the person who is unauthorized to be on the land. (This problem is addressed in LC 87.)

(2) enforcement. County attorneys are not prosecuting trespassers in sufficient numbers, and wardens' enforcement authority is extremely limited (the latter problem is addressed in LC 87); and

(3) penalties.

With regard to the first problem, some argued that the posting requirement is an unfair imposition on the landowner. Signs are removed or destroyed. The opposing view is that it is sometimes difficult for an individual to know if land is public or private, particularly in light of the checkerboard patterns of land ownership. A person can enter the land of another unknowingly.

The committee considered expanding the prohibition of hunting big game animals on private property without permission (§87-3-304, MCA) to include the prohibition of any recreational activities on private property without permission. (Instead, however, the committee's recommended bill amends the general criminal trespass laws in Title 45.) It was also suggested that a trespass law be adopted that would be specific to water recreation (e.g., trespass within 100 yards of a waterway).

With regard to the second problem, county attorneys are overworked and underfunded.

Criminal trespass cases are not high enough on their list of priorities. Also, it is difficult to catch trespassers.

With regard to penalties, a particular problem mentioned is that under civil trespass cases it is difficult, if not impossible, to collect damages, unless the trespasser is found guilty of another wrongdoing, such as vandalism. Suggested remedies to the penalty problem included increasing civil penalties, as was done for bad checks in the 1983 Legislature, or establishing mandatory criminal sentences, as was done for drunk driving in the 1983 session.

-- Water Rights. If recreational use rights are protected by the public trust doctrine, will agricultural uses of water be threatened by recreational uses? Will this jeopardize the protections guaranteed Montana's water under the O'Mahoney - Millikin Amendment to the federal Flood Control Act of 1944? How will competing public trust interests be prioritized? Do recreational use rights conflict with the marketing of water?

COMMITTEE RECOMMENDATIONS

The bills that the committee will introduce in the 49th Legislature are found in Appendices A and B. Below is a summary of the bills, section-by-section, and, where appropriate, a discussion of the rationale behind the particular recommendations.

LC 69: AN ACT TO GENERALLY DEFINE LAWS GOVERNING RECREATIONAL USE OF STATE WATERS . . . .*

Section 1. Definitions. In subsection (1), the term "barrier" is defined because the word is used in subsection (3) of section 3 and in section 4 of the bill. The reason for using the particular definition is explained in the discussion of subsection (3) of section 3.

In subsection (2), the committee defined the term "ordinary high-water mark" because this is the boundary of the public's right to use the beds of waterways. The committee intended to make it clear that the boundary is the ordinary high-water mark, not the flood mark. The committee considered defining the ordinary high-water mark similarly to the manner in which it is defined in §36.2.402, Administrative Rules of Montana (as "the line that water impresses on the soil by covering it for sufficient periods of time to deprive the soil below the line of its vegetation and destroy its value for agricultural purposes"). It was felt that this definition was imprecise for two reasons:

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* Two committee members voted against the bill, as finally amended, because they objected to the limitations of the public's right to use the beds of waters found in section 3.

(1) The definition requires that the characteristics it describes be met. However, in reality, the ordinary high-water mark is distinguished by varying physical characteristics and the characteristics described in the rejected definition may not always exist. (The definition adopted by the committee is, in contrast, more flexible.)

(2) It was important to describe the lack of vegetation below the mark as terrestrial vegetation, since aquatic vegetation can grow below the mark.

Section 2. This section addresses recreational use of waters. Subsection (1) allows the public to make recreational use of surface waters capable of such use. The majority of the committee does not intend to imply that recreational use of waters under this subsection is founded in the public trust doctrine.*

Subsection (2) excepts from the waters the public is authorized to use for recreation waters while they are diverted away from a natural water body. For example, under this subsection, the committee intends that the public would not be allowed to make recreational use of waters in an irrigation ditch or stock watering pond. The legal opinions given to the committee were that the Montana Supreme Court's decisions did not apply to waters while they are being diverted, although this particular point was not at issue in the Curran or Hildreth cases.

* Two committee members hold a minority opinion with respect to this intent. It is their position that the public trust doctrine is a basis for the right of the public to use the waters that is articulated in this subsection.

Section 3. This section addresses the right of the public to use land below the ordinary high-water mark.* Subsection (1) affirms the right of the public to use the land between the ordinary high-water marks of surface waters that satisfy the federal title test of navigability. This subsection is a statement of federal law on the subject. The waters that are known to satisfy the federal title test are those that have been adjudicated as navigable for that purpose. For example, the Montana Supreme Court ruled that the Dearborn River satisfies the federal title test of navigability. The public also has the right, under subsection (1), to use the beds of waterways that are in fact navigable under the federal title test, even if they have not yet been adjudicated as such.

Subsection (2) provides that the public may not use the beds of waters that do not satisfy the federal title test of navigability unless: (1) the owner of the land or an authorized agent grants permission to use the land; or (2) such use is "unavoidable and incidental" to the use of the waters. This subsection differs from the Supreme Court decisions: in conjunction with subsection (3), defining "unavoidable and incidental" use of the land, it attempts to codify the rule for use of the land below the ordinary high-water marks that the Wyoming Supreme Court stated in Day v. Armstrong.[71]

> When so floating craft, as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft. Even a

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* At its last meeting, a motion to strike section 3 of the bill was defeated on a 4-4 vote. Those voting to strike section 3 opposed the restriction regarding use of the beds.

> right to disembark and pull, push or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement . . . .On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful. (at 145 and 146)

Subsection (3), defining "unavoidable and incidental" use of the lands, intends to incorporate in appropriate statutory language (e.g., "bypassing barriers") the conditions described by the Wyoming Court as permissible use of the lands. This may help explain why the term "barriers" is defined as it is in subsection (1) of section 1.

Section 4. Portaging: use of the land above the ordinary high-water mark. This section is a restatement of the Montana Supreme Court's decision. It is included because the bill attempts to codify comprehensively the law on water recreation.*

Section 5. Landowner liability. This section limits the liability of landowners in instances involving public recreational use of waters pursuant to section 2, and lands, when permitted or as an incidental use of the waters, pursuant to sections 3 or 4. Landowner liability is limited under subsection (2) to acts or

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* Two committee members voted against this amendment. They did not want to codify this element of the Curran and Hildreth decisions in the event that the Supreme Court is willing to reverse itself with regard to portaging if a case comes before it on this point in the future. It was their opinion that public rights in waters do not extend to rights to use privately owned land.

omissions that constitute "willful or wanton misconduct" on the part of the landowner. It is likely that this standard would be applied by a court even without such a statute. However, codifying the standard satisfies the concerns of landowners, in particular, who expressed the fear that they would be liable for injuries that might occur while members of the public make recreational use of water. This section is patterned after §70-16-301 and §70-16-302, MCA, which limit the standard for liability to "willful or wanton" acts causing injury for a landowner who permits a person to use the landowner's land for recreational purposes.

Subsection (3) does not limit the liability of a landowner or tenant who for compensation permits recreational use of the land described.

Section 6. Prescriptive easements. Subsection (1) defines prescriptive easements from well-established case law.

Subsection (2) declares that a prescriptive easement cannot be acquired through use of land or water for recreational purposes. There are presently no statutes in Montana addressing prescriptive easements. Case law regarding the acquisition of prescriptive easements through recreational use is unsettled. The committee chose to set the rule, as stated here, to satisfy the concerns of landowners.

Section 7. Amendment of §70-19-405, MCA. This amendment is made to provide conformity with section 6.

Section 8. Repeal of §87-2-305, MCA, Montana's "fishing statute."[72] Basically, this law provides anglers with the right to angle below the ordinary high-water mark on navigable streams. It is repealed under the bill because it was the opinion of staff that this law is fairly meaningless and perhaps misleading. Under federal law, as already discussed, it is firmly established that members of the public (including anglers) have the right to use the beds of navigable waters between the ordinary high-water marks. This right is affirmed in subsection (1) of section 3 of the bill. Section 87-2-305, MCA, is therefore redundant and is not reflective of the broader rights that members of the public have to recreate in ways other than angling below the ordinary high-water mark on the beds of waters navigable under the federal title test.

Sections 9-12. Codification instruction; severability; applicability; and effective date. These sections are self-explanatory.

LC 87: AN ACT ELIMINATING THE REQUIREMENT THAT NOTICE BE POSTED OR OTHERWISE COMMUNICATED FOR THE COMMISSION OF THE OFFENSE OF CRIMINAL TRESPASS TO LAND . . . .

Section 1. Amendment to §10-1-612, MCA. This statute relating to criminal trespass upon places used for military purposes is amended in order that its punishment provision be consistent with the punishment provisions contained in the amendments to §45-6-203, MCA, in section 3 of the bill.

Section 2. Amendment to §45-6-201, MCA. The amendment to this section eliminates the requirement that notice be posted or otherwise communicated in order to

establish that a person has "entered or remained unlawfully" upon land. The purpose of this amendment is to shift the responsibility for preventing the unauthorized entrance upon land of another from the landowner to the person who is not authorized to be there. (Note, the term "occupied structure" is stricken in this amendment as a drafting measure, since "premises" is defined in §45-2-101, MCA, to include "any type of structure.")

Section 3. Amendment to §45-6-203, MCA. This is the section that criminalizes the unlawful behavior (trespass to premises) described in §45-6-201, MCA, and provides a penalty for such criminal behavior.

Subsection (1) of §45-6-203, MCA, is amended in the bill to provide for two types of criminal trespass: (1) trespass to premises, including land, committed "knowingly" (this is the present law); and (2) trespass to land (not all premises) committed by the mere act of trespass, regardless of the mental state of the trespasser (this is the new provision). Eliminating the presence of a mental state as a precondition to a criminal act creates a condition termed "absolute liability," which is defined under Montana law in §45-2-104, MCA.

Subsection (2) of §45-6-203, MCA, provides the penalty provision for the trespass actions. The penalty for trespass committed "knowingly" is unchanged: a fine not to exceed $500, imprisonment for a term not to exceed 6 months, or both. The penalty for trespass committed regardless of the mental state of the trespasser conforms to the penalty required by the law defining absolute liability: a fine not to exceed $500.

Section 4. Amendment of §87-1-504, MCA. This amendment expands the type of property on which the game wardens must enforce the criminal trespass, criminal mischief, and litter laws.* Under the present law, the wardens must enforce these laws "on private lands where public recreation is permitted," a seemingly contradictory condition in reference to criminal trespass. The Department of Fish, Wildlife, and Parks interprets trespass under this section to mean actions which go beyond the limits of recreation that a landowner permits. For example, a landowner may permit hunting and require that hunters check in with the landowner before proceeding to hunt. A hunter neglecting to check in with the landowner could be a trespasser "on private lands where public recreation is permitted." However, on lands on which recreation is not permitted, wardens now do not have the authority to enforce the criminal trespass laws. For example, on these lands, a warden (or an ex-officio warden, such as a Department river patroller) who patrols a stream does not have authority to enforce trespass actions he observes while on patrol. The committee's amendment expands the type of property on which the wardens must enforce the criminal trespass, criminal mischief, and litter laws to "private lands being used for recreational purposes."

Section 5. An immediate effective date is established.

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* Three committee members opposed this amendment because they feared it might require an excessive appropriation. In addition, two of the three had reservations about extending the wardens' enforcement authority of these laws to all private lands.

FOOTNOTES

[1]Montana Coalition for Stream Access v. Curran, December 7, 1982, First Judicial District, Case No. 45148. Montana Coalition for Stream Access v. Hildreth, December 7, 1982, Fifth Judicial District, Case No. 9604.

[2]Persons and groups most involved in the conflict are reflected by those entered as Amicus Curiae in the appeals before the Montana Supreme Court. These included Professor Al Stone, as an individual, and the National Wildlife Federation, Montana Wildlife Federation, Montana Stockgrowers Association, Montana Woolgrowers Association, Montana Farm Bureau Federation, American Farm Bureau Federation, Wyoming Farm Bureau Federation (these last three organizations filed a brief in the Hildreth case only), and Montana Council of Trout Unlimited. These are in addition to the coalition of recreational water users and the ranchers they sued, who were principals in the case.

[3]HB 799, HB 801, HB 877, HB 888, SB 347, SB 348, and SB 357.

[4]682 P.2d 163, 41 St. Rep. 906 (Mont. 1984).

[5]684 P.2d 1088, 41 St. Rep. 1192 (Mont. 1984).

[6]Minutes from this and all other committee meetings are on file at the Legislative Council, Helena. In addition, a list of papers presented to the committee and other papers prepared by staff on the subject during the interim follow these footnotes in the Index of Committee Materials.

[7]362 P.2d 137 (Wyo. 1961).

[8]This chapter is a recently edited version of the paper prepared for and presented to the committee by this author. The original paper is cited in the Index of Committee Materials following these footnotes.

[9]Johnson and Austin, "Recreational Rights and Titles to Beds on Western Lakes and Streams," 7 Natural Resources Journal 1,4 (Jan. 1967).

[10]State policymakers should have an interest in navigability for title purposes since the state has an interest in the lands it owns. The state's role in title determinations is limited to applying rules developed in federal court for determining the

question. (See text on p. 15-17 and accompanying notes.) Navigability for purposes of federal authority under the Commerce Clause is of particular interest to the policymakers only in that federal powers established under this constitutional provision preempt state law, and therefore the committee should be aware of navigability in this context.

[11]Stone, "Origins and Meanings of 'Navigable' and 'Navigability,'" presentation to Interim Legislative Subcommittee #2, Aug. 31, 1983, p. 1. (On file at the Legislative Council.)

[12]Martin v. Waddel, 41 U.S. (16 Pet.) 367 (1842).

[13]Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845).

[14]Barney v. Keokuk, 94 U.S. 324 (1876).

[15]The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1851) and The Daniel Ball.

[16]United States v. Utah, 283 U.S. 64, 75 (1931).

[17]Ibid., at 82-83.

[18]Ibid., at 75.

[19]Ibid., at 86.

[20]Oklahoma v. Texas, 258 U.S. 574, 585 (1922).

[21]United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926).

[22]Stone, Public Rights in Water Uses and Private Rights in Land Adjacent to Water, 1 Waters and Water Rights, §41.2(B) for the general rule and §42.2(B) for the exceptions to the rule, as under Montana law (Clark, editor, 1967).

[23]Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 452 (1892). See also, Stone, Public Rights in Water Uses, supra at §36.4(B), note 95 and accompanying text and §37.2(C), notes 36-40 and accompanying text.

[24]§87-2-305, MCA. Note that §87-2-305, is repealed in the committee's proposed legislation, LC 69. However, the public easement is retained in subsection (1) of section 3 of LC 69 (and is broader in scope than in §87-2-305, MCA, in that it applies to any

public use, not only angling). (See discussion of subsection (1) of section 3 and section 8 of LC 69 in the final chapter of this report and accompanying notes.)

[25]22 U.S. (9 Wheat.) 1 (1824).

[26]311 U.S. 377 (1940).

[27]The qualifier "probably" is used because the courts have not clearly settled this question. However, authorities generally draw this conclusion. An excellent discussion of this issue is found in Johnson and Austin, supra note 9, at 17-20.

[28]The Montello, 78 U.S. (11 Wall.) 411, 415 (1870); Sierra Pacific Power Company v. Federal Energy Regulatory Commission, 681 F.2d 1134, 1137-38 (9th Cir. 1982).

[29]Supra note 26, at 408.

[30]The breadth of federal powers over waterways under the Commerce Clause is illustrated by the regulations adopted by the U.S. Army Corps of Engineers as to the scope of their powers. Federal Register, Vol. 47, No. 141, July 22, 1982, part 329.

[31]A thorough discussion of the extent of federal powers is found in Leighty, supra note 30, at 401-432.

[32]See, for example, Stone, "Legal Background on Recreational Use of Montana Waters," 32 Mont. Law Rev. 1, 6 (Winter 1971); Leighty, "The Source and Scope of Public and Private Rights in Navigable Waters," 5 Land and Water Law Review 391, 426 (1970).

[33]For example, in Southern Idaho Fish and Game Association v. Picabo Livestock, 528 P.2d 1295 (Idaho 1974), the Court stated: "The federal test of navigability involving as it does property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft." (at 1298)

[34]The common-law rule, translated from Latin, is: "He who owns the soil has it even to the sky."

[35]Stone, Public Rights in Water Uses, supra note 21, at §37.4(A).

[36]Johnson and Austin, supra note 27, at 36.

[37]53 N.W. 1139 (Minn. 1893).

[38]This author has not systematically reviewed case law throughout the country on this point. However, in a telephone conversation with Al Stone on November 19, 1984, his response to a question from the author as to whether any states other than Colorado limit public recreational use of waters to those navigable under the federal title test, he responded: "Particularly in the West, I don't think there are any others."

Also, although the significance of the case may be limited by its factual situation, in Bott v. Commission of Natural Resources, 327 N.W. Rep. 2d 838 (1982), the Supreme Court of Michigan explicitly refused to substitute a recreational craft test for a log floating test to determine navigability.

[39]Johnson and Austin, supra note 27, at 34.

[40]State v. Red River Valley Co., 182 P.2d 421 (N.M. 1945).

[41]Day v. Armstrong, supra note 7.

[42]See Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right," 14 University of California, Davis Law Rev. 195, 208-209 (1980); Leighty, "Public Rights in Navigable State Waters -- Some Statutory Approaches," 6 Land and Water Law Review 459, 474 (1971); and Knuth, "Bases for the Legal Establishment of a Public Right of Recreation in Utah's 'Non-Navigable' Waters," 5 Journal of Contemporary Law 95, 103-05 (Winter 1978). The other states cited include Missouri, Idaho, and California.

[43]N.M. Const., Art. 16, §2.

[44]Wyo. Const., Art. 8, §1.

[45]Colo. Const., Art. 16, §5.

[46]597 P.2d 1025 (Colo. 1979).

[47]See note 38.

[48]For example, Johnson v. Seifert, 100 N.W. 2d 689 (Minn. 1960) and Snively v. Jaber, 296 P.2d 1015 (Wash. 1956).

[49]Johnson and Austin, supra note 27, at 41.

[50]655 P.2d 1133 (Utah 1982).

[51]Stone, Amicus Curiae Brief, Montana Coalition for Stream Access v. Curran, Case No. 83-164, filed August 26, 1983, p. 6. (The same position is taken by Stone in his brief filed in Montana Coalition for Stream Access v. Hildreth.)

[52]To a very large extent, this chapter selectively incorporates material from John Thorson's, "The Public Trust Chautauqua Comes to Town: Implications for Montana's Water Future," and Brenda Desmond's oral presentation to the State Bar of Montana's Continuing Legal Education seminar on Water Rights Adjudication/ Stream Access for Recreational Use, held in Lewistown on November 2, 1984. (Both Thorson's paper and a written version of Desmond's oral presentation are cited in the Index of Committee Materials, following these footnotes.)

[53]Justinian: 533 A.D., Institutes.

[54]Bracton: Concerning the Laws and Customs of England, 1256.

[55]See Inhabitants of W. Roxbury v. Stoddard, 89 Mass. 158, 166-167, 171 (1863).

[56]Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.

[57]Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

[58]146 U.S. 387 (1892).

[59]National Audubon Society v. Department of Water and Power of the City of Los Angeles, 658 P.2d 709 (Cal. 1983); Curran, supra note 4; and Hildreth, supra note 5.

[60]National Audubon Society, supra note 59; Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

[61]Supra note 59. The status of the Mono Lake case, particularly with regard to the interrelationship of the public trust doctrine and the prior appropriative system of water rights, is discussed by Brenda Desmond in a letter to the committee dated August 9, 1984. (On file at the Legislative Council.)

[62]Marks v. Whitney, supra note 60, at 380.

[63]This chapter is a slightly modified version of Margery Brown's paper, ". . . The Doctrine is Out There Awaiting Recognition," which is cited in the Index of Committee Materials.

[64]For example, in written testimony to the committee at its September 28, 1984, meeting, Jim Flynn, Director of the Department of Fish, Wildlife, and Parks, provided estimates of the increase in water recreation over approximately the past 20 years. For example, speaking only of anglers, he stated, "The three million angler days figure for 1982-83 represents an increase of about 200,000 angler days over 1975-76 figures and an increase of around 900,000 angler days over 1968-69 figures." (p.2) (His testimony is on file at the Legislative Council.)

[65]For example, Mr. Flynn reported, "Figures indicate that resident and nonresident fishermen directly spent around $90 million during 1982." Ibid., p.2.

[66]Peg Allen, Committee Minutes, September 28, 1984, p. 27.

[67]Paul Roos, Committee Minutes, March 31, 1984, p. 24.

[68]Jim Flynn, Committee Minutes, September 28, 1984, p. 16.

[69]Franklin Grosfield, Committee Minutes, July 30, 1984, p. 22; written testimony to the committee at the same meeting, provided by Bill Asher, representing the Agricultural Preservation Association, the Park County Legislative Association, and the Sweetgrass County Agricultural Preservation Association (on file at the Legislative Council).

[70]Brodsky, "Terms and Activities" paper, cited in Index of Committee Materials at the end of this report, p. 9.

[71]Supra note 7.

[72]In addition to providing anglers an easement between the high- and low-water marks on federally navigable waters, §87-2-305, MCA, provides such an easement on "rivers, sloughs, and streams flowing through any public lands of the state" and "within the meander lines of navigable streams." Although the right to angle under the provisions of §87-2-305, MCA,

strictly speaking, may be slightly broader than the right created in subsection (1) of section 3 of the bill, it was staff opinion that the clarity of the provision in the bill outweighed both the confusion created by §87-2-305, MCA, and the possible rights that would be diminished by repealing that statute. Also, since a purpose of LC 69 was to codify comprehensively the law on recreation, it was felt that §87-2-305, MCA, should be repealed and its provisions placed in the comprehensive law.

INDEX OF COMMITTEE MATERIALS

Materials Prepared by Committee Staff

Understanding the term "Navigability", January 1984 (Brodsky).

Significant Cases on Navigability (and Outline), January 1984 (Desmond).

Department of Fish, Wildlife, and Parks' Authority Over Recreational Use of State Waters, July 1984 (Brodsky).

Issues of Landowner Liability, July 1984 (Desmond).

Prescriptive Easements, July 1984 (Desmond).

Terms and Activities That May Be Associated with Recreational Use of Waterways: Access, Trespass, Litter, Criminal Mischief, and Public Nuisance Laws, July 1984 (Brodsky).

Outline: The Public Trust Doctrine: Scope of Legislative Powers, October 1984 (Desmond). (Presented to State Bar of Montana, Continuing Legal Education, Seminar on Water Rights Adjudication/Stream Access for Recreational Use, Lewistown, Montana, Nov. 2, 1984.)

Outline: Summary of Legislative Subcommittee's Work During 1983-84 Interim on Recreational Use of Waters, October 1984 (Brodsky). (Presented to State Bar of Montana, Continuing Legal Education, Seminar on Water Rights Adjudication/Stream Access for Recreational Use, Lewistown, Montana, Nov. 2, 1984).

Written version of Desmond's oral presentation to the State Bar of Montana's Seminar, Nov. 2, 1984.

Materials Prepared by Experts Testifying Before Committee

". . . The Doctrine is Out There Awaiting Recognition." Margery H. Brown, School of Law, University of Montana, July 1984.

Origins and Meanings of "Navigable" and "Navigability", Albert W. Stone, Professor of Law, University of Montana.

The Public Trust Chautauqua Comes to Town: Implications for Montana's Water Future, John E. Thorson, July 1984.

Other Authorities Not Cited in Footnotes

Frank, "Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest," 16 U.C. Davis 573 (1983).

Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 471 (1970).

Sax, "Liberating the Public Trust from Its Historical Shackles," 14 U.C. Davis L. Rev. 185 (1980).

APPENDIX A

LC 69: An Act to Generally Define Laws Governing Recreational Use of State Waters

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF INTERIM SUBCOMMITTEE NO. 2

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY DEFINE LAWS GOVERNING RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; PROHIBITING, WITH CERTAIN EXCEPTIONS, USE OF PRIVATE LAND BENEATH WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION OR LAND IS BEING USED AS AN INCIDENT OF WATER RECREATION; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE; AMENDING SECTION 70-19-405, MCA; REPEALING SECTION 87-2-305, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. For purposes of [sections 3 and 4], the following definitions apply:

(1) "Barrier" means a natural or artificial obstruction located in or over a water body, restricting passage on or through the water. A barrier may include but is not limited to bridges, fences, fallen trees, rocks, shoals, or rapids.

(2) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to lack of terrestrial vegetation or lack of agricultural crop value.

LC 0069/01

NEW SECTION. Section 2. Recreational use of waters permitted -- exception. (1) Except as provided in subsection (2), any surface waters that are capable of recreational use may be so used by the public without regard to ownership of the land underlying the waters.

(2) The public may not make recreational use of surface waters while they are diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3.

NEW SECTION. Section 3. Use of land between ordinary high-water marks -- when permissible -- when prohibited. (1) A member of the public may use the land between the ordinary high-water marks of surface waters that satisfy the federal test of navigability for purposes of state ownership.

(2) A member of the public may not use the land between the ordinary high-water marks of surface waters that do not satisfy the federal test of navigability for purposes of state ownership, except when:

(a) such use is unavoidable and incidental to use of the waters permitted under [section 2]; or

(b) the owner of such land or his authorized agent grants permission to use the land.

(3) Use of the land is unavoidable and incidental to use of the waters permitted under [section 2] only when the use is temporarily necessary for purposes of safety, health, or bypassing barriers.

NEW SECTION. Section 4. Portaging -- when permissible. A member of the public may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.

NEW SECTION. Section 5. Restriction on landowner liability during recreational use of waters or land. (1) Any person who uses for recreational purposes surface waters flowing over or through any land in the possession or under the control of another, pursuant to [section 2], or land while portaging around barriers or as an unavoidable or incidental use of the waters, pursuant to [section 3 or 4], does not have the status of invitee or licensee.

(2) A landowner or tenant is liable to a person using, for recreational purposes, waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) This section does not apply to a landowner or tenant who for compensation permits the land described in

subsection (1) to be used for recreational purposes.

NEW SECTION. Section 6. Prescriptive easement not acquired by recreational use. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through use of land or water for recreational purposes.

Section 7. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 6], occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

NEW SECTION. Section 8. Repealer. Section 87-2-305, MCA, is repealed.

NEW SECTION. Section 9. Codification instruction. Section 5 is intended to be codified as an integral part of Title 70, chapter 16, part 3, and the provisions of Title 70, chapter 16, part 3, apply to section 5.

NEW SECTION. Section 10. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains

in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 11. Applicability. Sections 6 and 7 apply only to a prescriptive easement that has not been perfected prior to the effective date of this act.

NEW SECTION. Section 12. Effective date. This act is effective on passage and approval.

-End-

APPENDIX B

LC 87: An Act Eliminating the Requirement That Notice be Posted or Otherwise Communicated for the Commission of the Offense of Criminal Trespass to Land

LC 0087/01

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF INTERIM SUBCOMMITTEE NO. 2

A BILL FOR AN ACT ENTITLED: "AN ACT ELIMINATING THE REQUIREMENT THAT NOTICE BE POSTED OR OTHERWISE COMMUNICATED FOR THE COMMISSION OF THE OFFENSE OF CRIMINAL TRESPASS TO LAND; IMPOSING ABSOLUTE LIABILITY FOR CERTAIN CRIMINAL TRESPASSES TO LAND; EXPANDING THE AUTHORITY OF WARDENS TO ENFORCE THE CRIMINAL MISCHIEF, CRIMINAL TRESPASS, AND LITTER LAWS ON PRIVATE LANDS BEING USED FOR RECREATIONAL PURPOSES; AMENDING SECTIONS 10-1-612, 45-6-201, 45-6-203, AND 87-1-504, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 10-1-612, MCA, is amended to read:

"10-1-612. Arrest of trespassers and disturbers. (1) The commanding officer may arrest or authorize the arrest of a person who trespasses upon a camp or parade ground, armory, arsenal, rifle range, or any other place devoted to or used for military purposes.

(2) The commanding officer may arrest a person who:

(a) interrupts, molests, or disturbs the orderly discharge of duty by those under arms;

(b) disturbs or prevents the passage of troops going to or returning from any duty; or

(c) assaults a member of the uniformed militia while that member is performing any military duty.

(3) A person who is arrested under this section shall be transferred to the civil authorities in the county where the offense was committed.

(4) A person committing an offense for which an arrest may be made pursuant to this section is ~~guilty of a misdemeanor~~ punishable as provided in 45-6-203."

Section 2. Section 45-6-201, MCA, is amended to read:

"45-6-201. Definition of "enter or remain unlawfully". ~~(1)~~ A person enters or remains unlawfully in or upon any vehicle~~, occupied structure~~, or premises when he is not licensed, invited, or otherwise privileged to do so. ~~A person who enters or remains upon land does so with privilege unless notice is personally communicated to him by an authorized person or unless such notice is given by posting in a conspicuous manner.~~

~~(2) In no event shall civil liability be imposed upon the owner or occupier of premises by reason of any privilege created by this section.~~"

Section 3. Section 45-6-203, MCA, is amended to read:

"45-6-203. Criminal trespass to ~~property~~ land and other premises. (1) (a) A person commits the offense of criminal trespass ~~to property~~ if he ~~knowingly~~:

~~(a)~~(i) knowingly enters or remains unlawfully in ~~an occupied--structure~~ or upon the premises, including land, of another; or

~~(b)~~(ii) enters or remains unlawfully ~~in--or--upon--the premises~~ upon land of another.

(b) Absolute liability within the meaning of 45-2-104 is imposed for the conduct described in subsection (1)(a)(ii).

(2) (a) A person convicted of the offense of criminal trespass ~~to-property~~ under subsection (1)(a)(i) shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

(b) A person convicted of criminal trespass under subsection (1)(a)(ii) shall be fined not to exceed $500.

(3) For purposes of this section, "land" has the same meaning as the definition contained in 70-16-102."

Section 4. Section 87-1-504, MCA, is amended to read:

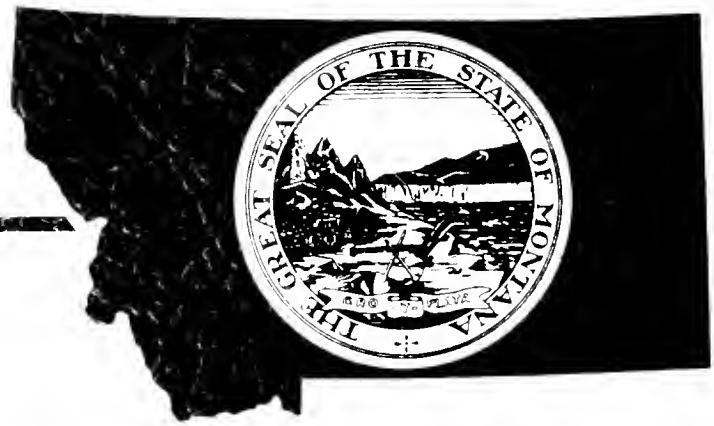
"87-1-504. Protection of private property -- wardens as ex officio fire wardens. (1) It shall be the duty of wardens (state conservation officers) to enforce the provisions of 45-6-101, 45-6-203, and 75-10-212(2) on private lands ~~where-public--recreation--is--permitted~~ being used for recreational purposes and to act as ex officio fire wardens as provided by 77-5-104.

(2) As used in this section, "recreational purposes"

has the same meaning as the definition contained in 70-16-301."

NEW SECTION. Section 5. Effective date. This act is effective on passage and approval.

-End-



of this public document were published at an estimated cost of $2.13 per copy, for a total cost of $852.00, which includes $852.00 for printing and $.00 for distribution